CASE NO. 83–996

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ARTHUR LANCE BIER,

Petitioner,

v.

PAUL D. FLEMING, JR., and
CHARLES I. ALATIS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT FLEMING'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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ATTORNEYS FOR RESPONDENT

QUESTION PRESENTED

WHETHER THE COURT OF APPEALS FOR THE SIXTH CIRCUIT CORRECTLY DETERMINED THAT THE TRIAL COURT'S DECISION, HOLDING THAT A STATE OFFICIAL ACTING IN A MINISTERIAL CAPACITY WAS NOT ENTITLED TO THE DEFENSE OF QUALIFIED IMMUNITY, WAS NOT SUPPORTED BY THE RECORD.

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STATEMENT OF THE CASE

On August 24, 1977, the Ohio State Racing Commission notified Arthur Bier of their intention to revoke his license as a driver in harness horse races, and of his opportunity to have a hearing on the matter. The hearing was held on September 7, 1977; an order of revocation was issued on September 8, and Bier appealed the order to the Summit County Court of Common Pleas. He raced for the remainder of 1977.

The Complaint in the District Court was filed on January 6, 1978, seeking injunctive relief and damages for violation of state statutes regarding the conduct of administrative hearings, for conspiracy to violate the Plaintiff's civil rights, and for libel and slander. Named as Defendants were Paul D. Fleming, Jr., (the executive secretary of the Ohio State Racing Commission), Henry Stehmeyer (the chief investigator for the Commission), Charles I. Alatis (president and general manager of Painesville Raceway, Inc.), and the Ohio State Racing Commission. None of the five commissioners were individually named as Defendants.

The District Court dismissed all claims against the Ohio State Racing Commission and Mr. Stehmeyer, and dismissed the conspiracy claims and libel and slander claims against Respondent Fleming. The only issue that was tried against Fleming was whether his actions as executive secretary to the Ohio State Racing Commission violated Petitioner's right to due process under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. Section 1983.

Trial was held in February, 1981, and judgment was rendered on August 25, 1981. The District Court found

Fleming liable to Petitioner for nominal damages of one dollar and for attorney fees for his "participation" in the Ohio State Racing Commission's revocation of Petitioner's racing license in August, 1977.

Fleming appealed that judgment to the Court of Appeals for the Sixth Circuit, alleging six assignments of error. The Court of Appeals sustained one of those assignments, which concerned the issue of qualified executive immunity, but did not rule on Fleming's other assignments of error, which concerned Petitioner's successful utilization of Ohio's Administrative Procedure Act, whether or not Fleming "caused" a deprivation of Plaintiff's property without due process, and if so, whether Plaintiff was "injured" as a result. The Court of Appeals reversed and remanded with directions to dismiss the Complaint, and it is from this judgment that Petitioner has sought certiorari.

On October 19, 1983, the District Court dismissed the Complaint pursuant to remand.

STATEMENT OF FACTS

The Ohio State Racing Commission is composed of five members, appointed by the Governor. Respondent, Paul D. Fleming, Jr., at the time of the events *sub judice,* was the executive secretary of the Commission.[1] The executive secretary is not a member of the Commission; he is only an employee. The duties of the executive secretary are set forth in R.C. Section 3769.021:

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1. Although not a matter of record in this case, Respondent Fleming has since retired, and another person has assumed the position of executive secretary.

> The state racing commission shall appoint a secretary who shall serve during the pleasure of the commission.
>
> * * *
>
> The secretary *shall* attend all meetings of the commission. He shall keep a complete record of its proceedings. . . .
>
> He *shall* be the executive officer of the commission and be responsible for keeping all commission records and the carrying out of the rules, regulations and orders of the commission. He *shall* perform such other duties as the commission prescribes.

(Emphasis added.)

Petitioner, Arthur Bier, had been licensed by the Commission as a driver of standardbred horses. But the Commission licenses approximately 20,000 people each year, and Petitioner was not known by Respondent.

In August, 1977, the Commission received information indicating that Petitioner's Ohio standardbred license should be revoked for violation of the Ohio Rules of Racing, Chapter 3769 of the Ohio Administrative Code. As a result, a Commission meeting was called by the Chairman, and the commissioners decided to provide Petitioner a hearing on the matter of whether or not his license should be revoked.

After the meeting, Respondent Fleming performed his ministerial, statutory duty as the Commission's

executive secretary by causing a draft of a letter to be prepared notifying Petitioner of the Commission's action. This draft was transmitted to George E. Lord, the State's assistant attorney general who was representing the Racing Commission at that time, for his review. The draft, in pertinent part, stated:

> It has come to the attention of the Ohio State Racing Commission that you are listed as being in bad standing before the New York State Racing and Wagering Board. Pursuant to Rule 3769-3-23 (B) of the Ohio Rules of Racing your license as Driver-Trainer in the State of Ohio is hereby revoked by action taken by said Commission on August 24, 1977.
>
> You are further advised that if you request it within 30 days of the mailing of this letter, you are entitled to a public hearing on the question of said revocation of your Driver-Trainer license.

Attorney Lord did not approve the draft as it was presented to him. Instead, he crossed out the last clause in the first paragraph ("by action taken by said Commission on August 24, 1977"), and with that correction he approved the draft. After writing "Draft OK G.E.L." on the draft, he returned it to Respondent. Thus, the draft now appeared as follows:

> It has come to the attention of the Ohio State Racing Commission that you are listed as being in bad standing before the New York State Racing and Wagering Board. Pursuant to Rule 3769-3-23 (B)

> of the Ohio Rules of Racing your license as Driver-Trainer in the State of Ohio is hereby revoked ~~by action taken by said Commission on August 24, 1977.~~
>
> You are further advised that if you request it within 30 days of the mailing of this letter, you are entitled to a public hearing on the question of said revocation of your Driver-Trainer license.

After receipt of the approved, corrected draft, Respondent caused a notice letter to be sent to Petitioner. The letter contained the exact same language, no more and no less, as the draft approved by Attorney Lord.

Upon receipt of the notice letter, Petitioner requested a hearing before the Commission, and a hearing was held two weeks later, on September 7, 1977. After the hearing, the Commission voted to revoke Petitioner's license, and he appealed the revocation to one of Ohio's common pleas courts pursuant to Ohio's Administrative Procedure Act. A stay was granted by the common pleas court, and Petitioner was permitted to race for the remainder of 1977, when his license expired.

Petitioner filed his Complaint in the federal district court in January, 1978, when the Commission attempted to deny Petitioner a 1978 license.

SUMMARY OF ARGUMENT

This Honorable Court should not grant certiorari in this case for the following reasons: the case presents no matters of national interest; the decision of the court

below is not of such character as to be considered special and important under Supreme Court Rule 17.1 (a); and review by this Court would only confirm the reasoning and result of the court below.

ARGUMENT IN OPPOSITION TO CERTIORARI

This Honorable Court should not grant certiorari in this case as the matter involves only individual relief and presents no matters of national interest. The Supreme Court does not sit for the benefit of particular individual litigants, and certiorari should only be granted in cases where the Court must settle principles of importance to the public interest as distinguished from that of the parties. *Rice v. Sioux City Memorial Park Cemetary,* 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955).

The sole rationale advanced by Petitioner to justify certiorari is that the Sixth Circuit has departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. While this is a reason expressly listed in Supreme Court Rule 17.1 (a) as being of the character that will be considered special and important by the Court, the Opinion of the Sixth Circuit hardly constitutes such a departure.

The Sixth Circuit determined that the District Court's conclusion that Respondent drafted and signed the August 24, 1977, letter against the advice of counsel was unsupported by the Record. This determination was arrived at after a careful review of the Record and of the District Court's findings of fact and conclusions of law.

Petitioner erroneously claims that the Sixth Circuit "considered only part of the evidence and totally disregarded the findings of fact. . .that George Lord had informed Fleming that a hearing was necessary before he could revoke Bier's license." (Petition for Certiorari, pp. 29-30.) In fact, the Sixth Circuit squarely considered this finding of fact. (Opinion of September 19, 1983, p. 7, contained at p. 52 of the Appendix to the Petition for Certiorari.) The Sixth Circuit correctly concluded, however, that this finding of fact was likewise unsupported by the Record, and that Fleming was entitled to the defense of qualified, good faith immunity. (Appendix to the Petition for Certiorari, p. 53.)

In addition, Petitioner erroneously claims that review of the District Court's findings of fact is outside the scope of the Appellate Court's review. On the contrary, the principle has been well established that when, upon review of the evidence, the appellate court is left with the definite and firm conviction that a mistake was made, the finding of fact will be set aside. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746 (1958).

Finally, Respondent submits that this Honorable Court should not grant certiorari in this case because a ruling on the merits in Petitioner's favor would result in, at best, a remand to the Sixth Circuit for consideration of the other assignments of error raised by Respondent but not ruled upon by the Appellate Court. The Court below stated that "For purposes of this inquiry we assume, without deciding, that Bier did suffer a constitutional deprivation without due process of law." (Appendix to Petition for Certiorari, pp. 57-58.) Thus, four of Respondent's six assigned errors were not ruled upon.

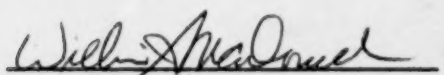
CONCLUSION

The legal issue which Petitioner is attempting to raise is founded upon inaccurate representations of the Sixth Circuit's Opinion, as well as unsupported and inaccurate statements of law. Moreover, resolution of the issue presents no question of general or substantial national public interest. Finally, certiorari would necessitate review of the trial court's findings of fact, as well as the transcript of the trial, and would only confirm the reasoning and result of the Court of Appeals.

WHEREFORE, Respondent asks this Court to *deny* the petition for certiorari.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio



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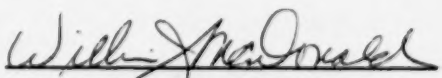
ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Respondent Fleming's Brief in Opposition to Petition for Writ of Certiorari has been forwarded to the Petitioner through the office of his Counsel of Record, Jack N. Turoff, 1127 Euclid Avenue, Cleveland, Ohio 44115 and to Respondent Charles Alatis through the office of his Counsel of Record, John G. Papandreas and Jonathan H. Soucek, 706 Citizens Building, Cleveland, Ohio 44114. I further certify that all persons required to be served have been so served. Said mailing was made by depositing the appropriate number of copies in the U.S. Mail, first class, postage prepaid, this 26th day of January, 1984.



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